



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 30, 1994

Mr. Herbert L. Prouty
General Counsel
El Paso Water Utilities Public Service Board
P.O. Box 511
El Paso, Texas 79961-0001

OR94-609

Dear Mr. Prouty:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27922.

The El Paso Water Utilities Public Service Board ("the board") received a request for information pertaining to Bid No. 39-94 for the renovation of Jackson Reservoir. You explain that, with regard to some of the requested information, you are seeking clarification of the information the requestor is seeking and informing the requestor of the documents the board possesses which are responsive to the request. However, the board seeks to withhold from required public disclosure certain insurance information, specifically, the "carrier name, policy number, policy period and agent (if any) or other contact information of your employers Errors and Omissions Insurance company." You contend that the board may withhold the requested insurance information based on sections 552.101, 552.103, and 552.110 of the Government Code.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Gov't Code § 552.101. You raise section 101.104 of the Civil Practice and Remedies Code, which states as follows:

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under this chapter.

(b) Neither the existence nor the amount of the insurance is subject to discovery.

This provision prohibits the admission and the discovery of insurance information during a trial under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. It does not make insurance information confidential. Moreover, this office has explicitly stated that section 552.101 of the Government Code does not encompass discovery privileges. Open Records Decision No. 575 (1990) at 2. Therefore, the board may not withhold the requested insurance information pursuant to section 552.101 of the Government Code.

You raise section 552.103(a) of the Government Code, which applies to information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You assert that the board may reasonably anticipate litigation because the potential opposing party has stated that "[y]ou are also hereby notified to place your Errors and Omissions Insurance carrier on notice that a claim may be pending as a result of events which transpired resulting from recent actions of you, Mr. Conover and/or both of you." In subsequent correspondence to you, the potential opposing party has stated that "[i]f I do not receive an acceptable response to my request [for a response to a letter to another individual], I will be forced to pursue a claim and possibly other action in order to limit the damage my firm has endured as a result of his actions. I have no desire to take this action, but must do so to protect my Company."

To establish that litigation is reasonably anticipated, a governmental body must provide concrete evidence that litigation is realistically contemplated; that litigation is realistically contemplated must be more than mere conjecture. Open Records Decision No. 518 (1989). Steps toward litigation must have been taken. See Open Records Decision No. 555 (1990) at 3.

This office has determined that litigation is not reasonably anticipated when a requestor has publicly stated on more than one occasion an intent to sue. Open Records Decision No. 331 (1982). On the other hand, several threats to sue and the hiring of an attorney establish that litigation is reasonably anticipated. Open Records Decision

No. 288 (1981). In addition, the hiring of an attorney and the attorney's assertion of an intent to sue evidences reasonable anticipation of litigation under section 552.103(a). See Open Records Decision No. 555.

We do not think you have established that litigation is reasonably anticipated in this case. The potential opposing party has taken no steps toward litigation. He has stated that "a claim may be pending," and that "if [he] do[es] not receive an acceptable response [from Mr. Conover] . . . , [he] will be forced to pursue a claim." However, there is no indication that the potential opposing party intends to follow through with these threats. For example, you have not stated that Mr. Conover does not intend to respond to the potential opposing party's request for a response to his inquiries. Nor have you explained how the circumstances of the rejection of the bids made in response to Bid No. 39-94 would give rise to litigation. We, therefore, conclude that the board may not withhold the requested insurance information based on section 552.103(a) of the Government Code.

Finally, you raise section 552.110 of the Government Code, which protects

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person. You do not assert that the requested information is a trade secret. "Commercial or financial information" must be confidential under the common or statutory law of Texas in order to be exempt from disclosure under this exception. See Open Records Decision No. 592 (1992). When discussing your claim under section 552.101, we concluded that the requested information is not confidential under statutory law. Nor does the common law of Texas make this information confidential. Consequently, you may not withhold the requested information under section 552.110 of the Government Code.

In conclusion, the requested information is public information. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/KKO/rho

Ref.: ID# 27922

Enclosures: Submitted documents

cc: Mr. Paul B. Choman
President
Jack Whisler, Inc.
946 Hawkins Blvd.
El Paso, Texas 79915
(w/o enclosures)